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NO. 63442-9-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

DOUGLAS JASPER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT.

Douglas Jasper unintentionally hit another car while driving. He was shocked and dazed by the accident, and walked along the street afterward. Because he did not remain at the scene, he was charged with hit and run as well as driving with a suspended license in the third degree.

Over Jasper's objection, the prosecution relied on a government-generated declaration that a "diligent" search of the state's driving records showed Jasper's license was "suspended in the third degree." The prosecution's reliance on this written declaration violated Jasper's right of confrontation and also constituted impermissible opinion testimony on the ultimate issue. Because the State used Jasper's suspended license to convince the jury Jasper was an irresponsible driver who routinely violated driving laws, the improperly admitted declaration establishing Jasper's suspended license contributed to the verdicts obtained for both charged offenses.

When the deliberating jury asked the court further questions about a driver's responsibilities given his mental or physical state after an accident, the court summarily refused to clarify pertinent law without fully discussing the matter with counsel or Jasper. The

court's failure to accurately instruct the deliberating jury or to accord both Jasper and his attorney the opportunity to craft a correct and appropriate response violated Jasper's right to a fair trial and his right to personally appear and participate in a critical stage of proceedings.

B. ASSIGNMENTS OF ERROR.

1. The State violated Jasper's right to confront witnesses against him, contrary to the Sixth Amendment and Article I, section 22.

2. The State relied on impermissible opinion testimony in violation of Jasper's right to a fair trial and "inviolate" right to a trial by jury as protected by the federal constitution and the more specific provisions of the Washington constitution.

3. The court inaccurately and coercively instructed the jury in response to its written questions during deliberations.

4. The court failed to provide Jasper and his attorney the opportunity to participate in responding to questions from the deliberating jury and improperly communicated to the jury without counsel or Jasper.

5. The court denied Jasper his state and federal constitutional rights to participate in a critical stage of proceedings.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. As recently clarified by the United States Supreme Court, written documents prepared by state agencies for use in a prosecution are testimonial and are not immune from the requirements of the confrontation clause when used at trial without affording the defendant the opportunity for cross-examination. Here, the State relied on a written declaration that Jasper's driving license was suspended in the third degree, and the State used this evidence to obtain convictions for both charged offenses. Did the State violate Jasper's right to confront witnesses against him and did the error contribute to the verdicts against Jasper?

2. Did the State's evidence claiming Jasper's license was suspended in the third degree constitute impermissible opinion testimony that invaded the province of the fact-finder and deny Jasper his inviolate right to trial by jury?

3. The court may not communicate with the jury without the presence of the attorneys. Here, the court responded to several jury questions without affording counsel an opportunity to be present and participate in the response. Did the court's failure to consult with the attorneys, as well as its inaccurate and coercive responses to the jury's questions, deny Jasper his state and federal

constitutional rights to the meaningful assistance of counsel and to participate in all critical stages of a criminal prosecution?

D. STATEMENT OF THE CASE.

On February 14, 2008, Douglas Jasper finished a long day of work as a cement finisher and as he drove his car home, he unintentionally crossed the center line and hit another car going in the opposite direction. 3/11/09RP 27.[1] Jasper blacked out as the accident occurred and has no memory of it. Id. at 28, 33. No one alleged he used alcohol or drugs, and no one claimed he was speeding.

After the accident. Jasper crawled out of a window and walked to the other car. 3/11/08RP 28. A woman was standing outside the other car. She seemed as dazed and shaken up as he was, but she did not seem otherwise injured. Id. at 29. He spoke with her and asked if she was okay. Id. at 29, 35. The woman, Jenny Li, had been the passenger in the other car and when the unexpected crash occurred, her car's airbags deployed and she was startled and shaken. 3/10/09RP 27. Later, she did not recall speaking to Jasper but others told her he came to the car to check

[1] The verbatim report of proceedings (RP) will be referred to herein by the date of proceedings followed by the page number.

on the driver. 3/10/09RP 33. The car's driver, Choon Wong, could not get out of the car because the door had pinned his arm and Li did not want to hurt him by moving him, so she waited for paramedics to arrive. 3/10/09RP 29, 37-39.

The driver of a third car, William Draper, saw Jasper climb out of his car window. 3/11/09RP 7. He heard Jasper ask the driver if he was okay but did not hear him say anything else, although at this time Draper was checking his own car to be sure it was not damaged. Id. at 8-9.

After Jasper checked on the other car, he began slowly walking along the street. 3/11/09RP 30, 39, 41. A witness followed him and alerted police that he was the driver of a car in the accident, in the event he was trying to leave the scene. Jasper did not run or hide, but did not return to his car immediately. He explained that he was tired and confused, had trouble seeing, and was trying to clear his head. 3/11/09RP 40-41. He intended to return and believed he was circling back to the accident scene. 3/11/09RP 30. The police arrested him several blocks from the accident and Draper identified him as the driver. He fell asleep, or passed out, in the police car after he was arrested. 3/11/090RP 31. He was not taken to the hospital for examination. Id.

The State charged Jasper with one count of hit-and-run and one count of driving with a suspended license in the third degree. CP 1-2. At trial, the prosecution offered a Department of Licensing (DOL) affidavit alleging that DOL had conducted "a diligent search" of its records and determined that as of February 14, 2005, Jasper's driving status was "suspended in the third degree." Ex. 16 (copy attached as Appendix A). Jasper objected to the document on the ground that it violated his right of confrontation, but the court overruled the objection and admitted the declaration from DOL and documents indicating his license had been suspended and not restored. 3/10/09RP 57.

The prosecution argued to the jury that Jasper's failure to comply with his licensing requirements demonstrated his propensity for avoiding responsibility and his failure to respect driving as a privilege not a right. 3/12/09RP 3, 11. The State claimed that Jasper's suspended licensing status showed it was important to him to avoid consequences and urged the jury to make him face those consequences by finding him guilty of both offenses.

While deliberating, the jury asked several questions, including a question about whether Jasper's mental or physical condition could be considered in evaluating whether he failed to

fulfill his obligations as a driver in a car accident. CP 49-52. The court responded without consulting counsel or Jasper and directed the jury to continue deliberating while refusing to provide any further instruction. Id.

The jury convicted Jasper of hit and run and driving with a suspended license in the third degree. CP 53, 54. The court imposed standard range sentences and Jasper timely appeals. CP 92-99; CP 100-02; CP 90-91. Pertinent facts are discussed in further detail in the relevant argument sections below.

E. ARGUMENT.

1. AN IMPROPERLY ADMITTED AFFIDAVIT ATTESTING TO ESSENTIAL ELEMENTS OF A CHARGED OFFENSE VIOLATED JASPER'S RIGHT OF CONFRONTATION AND CONTRIBUTED TO THE JURY'S VERDICTS AGAINST HIM, THUS REQUIRING REVERSAL OF HIS CONVICTIONS.

Rather than calling a witness to prove the charged offense of driving with a suspended license in the third degree, the prosecution relied on a written document prepared by the state's Department of Licensing for use in this criminal case. The document proclaimed that Jasper's driver's license was "suspended in the third degree," as of February 14, 2005. The prosecution's case rested on this document without affording

Jasper his fundamental right of confrontation. Moreover, the prosecution used this improperly admitted evidence to convince the jury that Jasper's irresponsible unlicensed driving also showed his disregard of driving laws and demonstrated his failure to obey the law following a car accident, and thus the error irreparably taints the hit and run conviction as well.

a. The confrontation clause prohibits admission of testimonial affidavits prepared by an absent witness. Using a written declaration prepared for use in a criminal prosecution violates the Sixth Amendment right of confrontation when it serves as an out-of-court statement by non-testifying witnesses and the accused person had no prior opportunity for cross-examination. Melendez-Diaz v. Massachusetts, _ U.S. __, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009); see Davis v. Washington, 547 U.S. 813, 830, 126 S.Ct. 2266, 165 L.Ed.2d 224, 237 (2006); Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 1359, 158 L.Ed.2d 177 (2004); State v. Mason, 160 Wn.2d 910, 920, 162 P.3d 396 (2007); U.S. Const. amend. 6 (guaranteeing a defendant the right, "to be confronted with witnesses against him."); Wash. Const. art. I, § 22 (guaranteeing the accused the right "to meet the witnesses against him face to face.").

In Melendez-Diaz, the United States Supreme Court explained how the Sixth Amendment applies to written declarations prepared by a forensic analyst. The Court rejected numerous arguments posited by the prosecution that affidavits are not testimonial, non-accusatory, neutrally report administrative information, or are business records. 129 S.Ct. at 2533-39.

The Melendez-Diaz Court clarified that other than actual business records, such as a certified copy of a previously created record generated in the regular course of business, records generated by the government are not exempt from confrontation requirements. A clerk may authenticate a previously created record that speaks to the administration of the entity's affairs, but a clerk may not "furnish, as evidence for the trial of a lawsuit, his interpretation of what the record contains or shows, or to certify to its substance or effect." 129 S.Ct. at 2539. Without an opportunity for cross-examination, a clerk may not do "what the analysts did here: create a record for the sole purpose of providing evidence against a defendant." Id.

Before Melendez-Diaz, the Washington Supreme Court ruled that DOL records attesting to a driver's license as either suspended or non-existent are not testimonial as defined by

Crawford. State v. Kirkpatrick, 160 Wn.2d 873, 882, 161 P.3d 990 (2007); State v. Kronich, 160 Wn.2d 893, 903, 161 P.3d 982 (2007).

But Melendez-Diaz conclusively held that a clerk's certificate attesting to a search of the records and resulting findings are inadmissible, and as a controlling United States Supreme Court interpretation of the Sixth Amendment, Melendez-Diaz supercedes Kirkpatrick and Kronich.

Several other courts have considered similar issues and reached the same results. In Tabaka v. District of Columbia, 976 A.2d 173, 176 (D.C. Ct. App. 2009), the court distinguished an earlier analogous ruling it issued before Melendez-Diaz, on the ground that its earlier ruling "cannot survive the holding and analysis of Melendez-Diaz." (citing Millard v. United States, 967 A.2d 155, 163 (D.C. 2009)). The court in Tabaka reversed a conviction for driving without an operator's permit because it rested on a clerk's affidavit that he had searched the records and found no record of a valid license for the accused person. 976 A.2d at 175-76. The clerk's statement was used as substantive evidence attesting to an important element of the charged offense, and the

clerk's testimony was inadmissible unless subject to confrontation. Id. at 175.

Similarly, in Washington v. State, __ So.3d __, 2009 WL 3189188 (Fla. App. 2009), the Florida Court of Appeals ruled that the admission of an affidavit attesting to a driver's lack of valid license violated the confrontation clause under Melendez-Diaz. The State's "certificate of non-licensure" prepared by a state-employed clerk reported that the defendant did not have a valid contractor's license. 2009 WL 3189188, *1. Based on Melendez-Diaz, the court concluded that the certificate attesting to lack of a valid license was prepared as part of the prosecution's investigation of the case and "is evaluative in the sense it represents not simply the production of an existing record but an assertion regarding the results of an individual's search of a database or databases." Id. at *2.

In the pre-Melendez-Diaz decisions of Kirkpatrick and Kronich, the Washington Supreme Court mentioned several times that the United States Supreme Court had not yet addressed whether the type of records at issue were akin to business records or testimonial assertions. Kirkpatrick, 160 Wn.2d at 882, 884; Kronich, 160 Wn.2d at 902. In the absence of clear direction from

the United States Supreme Court, the Washington Court decided that such records were presumptively reliable and cross-examination was unlikely to further the truth-seeking purpose of the confrontation clause.

Melendez-Diaz represents the controlling and binding precedent the Kirkpatrick and Kronich Courts sought but did not have available. Melendez-Diaz held firm to the rule that documents attesting to certain facts fall within the "core class" of testimonial evidence for which confrontation is required under the Sixth Amendment. 129 S.Ct. at 2532. A declaration following a government analysis is "a declaration of fact" and "incontrovertibly" is "made for the purpose of establishing or proving some fact." Id., citing Crawford, 541 U.S. at 51. The document attesting to a fact in question at a trial is the functional equivalent of a live witness and does precisely what a witness would do at trial on direct examination. Id., citing Davis, 547 U.S. at 830.

Moreover, if a document is prepared for the purpose of being available for use at trial, it is likely to be testimonial and Crawford therefore requires confrontation. Id. Here, the prosecution offered some records that could be considered business records, such as copies of notices mailed to Jasper to

warn him of the need to pay fines or risk a suspended license. Ex. 16. But the front cover page of Ex.16 is a document prepared by DOL that includes the very specific allegation critical to the prosecution, that following a "diligent" records search, DOL determined Jasper's driver's license was "suspended in the third degree," the offense with which he was charged and for which he was on trial. Ex. 16. This official declaration explaining the legal status of Jasper's driver's license is testimonial and was improperly admitted without the opportunity for cross-examination.

b. The improperly admitted DOL exhibit constituted impermissible opinion testimony on the ultimate issue. Jasper objected to the admission of the DOL record on the ground that it violated his right of confrontation. 3/10/09RP 57. Implicit in this objection was that the record contained an express opinion of Jasper's guilt and Jasper had no ability to confront or cross-examine this declaration. Indeed, he could not even seek clarification even though the document inexplicably asserted Jasper's license was suspended as of February 14, 2005, not 2008, when the incident occurred. Ex. 16. The prosecution tried to argue to the jury that this date was a mistake, and that in fact the document meant to indicate Jasper's license was suspended on

the date of the incident, but the court sustained Jasper's objection to the prosecution's opinion. 3/12/09RP 10. Jasper also moved for a mistrial based on the prosecution's injection of a personal opinion but the court denied the motion. 3/12/09RP 26-27.

Even without an objection, the improper insertion of an opinion of the accused person's guilt may be a manifest constitutional error. State v. Johnson, __ Wn.App. __, 2009 WL 3720654, *3 (Nov. 9, 2009). It is well-established that opinion testimony is "clearly inappropriate" in a criminal trial when it is an expression of belief as to a defendant's guilt, her intent, or the veracity of witnesses. State v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008); State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). Such opinions are unfairly prejudicial because they invade the fact finder's exclusive province. Montgomery 163 Wn.2d at 590; see also State v. Kirkman, 159 Wn.2d 918, 927-28, 155 P.2d 125 (2007); Wash. Const. art. I, § 21.

Johnson recounts a number of cases involving improper opinion testimony, such as the opinion that a victim suffered from "rape trauma syndrome" in a rape case; or that a child did not appear to be lying about sexual abuse. Black, 109 Wn.2d at 349; State v. Alexander, 64 Wn.App. 147, 154, 882 P.2d 1250 (1992);

see generally Johnson, 2009 WL 3720654, *3. In Montgomery, the impermissible opinions involved assertions that the defendant intended to manufacture methamphetamine, which was the offense charged. 163 Wn.2d at 694.

Here, the DOL declaration explicitly said its records showed Jasper's license was "suspended in the third degree." The prosecution exacerbated the error by directing the jury that DOL clearly intended to show Jasper's license was suspended in the third degree on the date of the incident, not in 2005. 3/12/09RP 10. This was the ultimate question presented to the jury and the opinions offered by DOL and the prosecution resolved the matter definitively.

This error invaded the province of the fact-finder and violated Jasper's right to a fair trial, in addition to the confrontation clause violation. Johnson, 2009 WL 3720654, *5; see Montgomery, 163 Wn.2d at 595; U.S. Const. amend. 6; Wash. Const. art. I, §§ 21, 22. Ex. 16 constitutes opinion testimony on the ultimate issue of whether Jasper was driving while his license was suspended in the third degree.

c. The prejudicial admission of DOL declarations tainted both convictions and requires reversal. Admission of

evidence in violation of the "bedrock" right of confrontation requires reversal unless the State proves beyond a reasonable doubt the unconfronted evidence did not affect the outcome of the case. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); see also Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986) ("The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt"); United States v. Alvarado-Valdez, 521 F.3d 337, 342 (5th Cir. 2008) (harmless error analysis following confrontation violation requires court to assess whether possible jury relied on testimonial statement when reaching verdict).

Here, the prosecution expressly used the improperly admitted evidence to construct its theory of why Jasper should be convicted not only of the suspended license offense, but also the hit and run. The prosecution argued that Jasper's failure to comply with his obligations to DOL demonstrated that he was the type of person who did not fulfill obligations such as those required under the hit and run statute. The prosecution proclaimed that the DOL documents "establish" the elements of the charge that Jasper was

driving with a suspended license and that he does not want to "face consequences" or fulfill "his responsibilities. 3/12/09RP 10-11. The prosecution made an emotional appeal to the jury that Jasper's failure to fulfill his responsibilities to DOL showed that he was more concerned about avoiding his responsibilities as a driver than helping injured people and it is "time for him to face those consequences and be accountable." 3/12/09RP 11.

The prosecution may contend that the error is harmless because shortly after the accident, a police officer asked Jasper if his license was suspended and he said it was. 3/10/09RP 56. But this non-specific information obtained after a distressing accident would not have been enough, alone, to convincingly prove Jasper's license was suspended due to the reasons required by the essential elements of the offense. CP 43-44 (Instruction 13, to-convict instruction for driving with suspended license); RCW 46.20.342(1)(c). Additionally, Jasper agreed in his testimony that his license was suspended. But he offered no explanation of why it was suspended, as would be required to prove the essential elements of having a license suspended in the third degree, and he may not have testified had the court not already overruled his confrontation clause objection to the DOL claim that his license

was suspended in the third degree. 3/11/09RP 36; see Van Arsdell, 475 U.S. at 684; see also Fields v. United States, 952 A.2d 859 (D.C. 2008) (finding improperly admitted drug analysis not harmless when government could not prove it did not contribute to the verdict obtained).

Finally, the prosecution must prove the erroneously admitted conclusory opinion from DOL that Jasper's license had been suspended in the third degree did not "contribute to the verdict obtained." Fields, 952 A.2d at 864; see Chapman, 386 U.S. at 24. Ex. 16 was the critical unassailable evidence against Jasper for driving with a suspended license and was central proof used to show Jasper was irresponsible and avoided facing the consequences of his actions, thus contributing to the verdict against him on both offenses.

2. THE TRIAL COURT IMPROPERLY AND COERCIVELY INSTRUCTED THE DELIBERATING JURY IN VIOLATION OF JASPER'S RIGHT TO A FAIR TRIAL, HIS RIGHT TO MEANINGFUL REPRESENTATION AT ALL CRITICAL STAGES, AND HIS RIGHT TO BE PRESENT

a. A criminal defendant is entitled to be aware of and meaningfully represented at proceedings discussing the instructions for a deliberating jury. The discussion of a jury inquiry

is a critical stage of a criminal proceeding at which a defendant has the right to be present and receive meaningful representation. Rogers v. United States, 422 U.S. 35, 39, 95 S.Ct. 2091, 45 L.Ed.2d 1 (1975); State v. Thomson, 123 Wn.2d 877, 880, 872 P.2d 1097 (1994); U.S. Const. amends. 5, 6, 14;[2] Wash. Const. Art. I, § 22;[3] CrR 3.4 (a). A trial court commits error when it communicates with the jury without notice to the defendant or counsel. State v. Caliguri, 99 Wn.2d 501, 509, 664 P.2d 466 (1983); State v. Allen, 50 Wn.2d 412, 419, 749 P.2d 702 (1988). CrR 6.15(f)(1) provides:

> After retirement for deliberation, if the jury desires to be informed on any point of law, the judge may require the officer having them in charge to conduct them into court. Upon the jury being brought into court, the information requested, if given, shall be given in the presence of, or after notice to the parties or their counsel. Any additional instruction upon any point of law shall be given in writing.

There are some simple scheduling matters or pure legal discussions at which a defendant cannot meaningfully contribute and his presence is not constitutionally required. In re Pers. Restraint of Lord, 123 Wn.2d 296, 306, 868 P.2d 835 (1994)

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[2] The Fifth and Fourteenth Amendments protect the right to "due process of law," while the Sixth Amendment protects the right to "a speedy and public trial" with the assistance of counsel and right to confront witnesses.

(conference on pretrial legal matter need not include defendant if no disputed facts involved). But aside from basic housekeeping details or technical legal questions, the defendant has the right to be present when a legal matter includes issues for which there are disputed facts or the defendant could potentially play a role in shaping the outcome. For example, the court in Lord cited its agreement with a case finding the right to be present during a hearing on the admissibility of a prior conviction. Id. (citing People v. Dokes, 595 N.E.2d 836, 839 (N.Y. 1992)). In Dokes, the court found that one key factor in assessing the right to be present is whether the proceedings involve factual matters "about which defendant might have peculiar knowledge that would be useful in advancing the defendant's or countering the [prosecution's] position." Id.

b. The trial court answered the jury's question without obtaining counsel's input and in Jasper's absence. The deliberating jury asked two separate questions and the court responded in writing without any on-the-record conversations. CP 49-52 (attached as Appendix A). The jury gave both questions to

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[3] "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel . . . .'

the court at 1:42 p.m., and the court returned both answers to the jury at 1:50 p.m. The clerk's minutes otherwise detail the presence and involvement of the parties in matters conducted both on and off the record and yet the minutes contain no indication that the court discussed the jury's questions with counsel or Jasper. Supp. CP _, sub. no. 87A, p. 8-9 (clerk's minutes).

The jury began deliberating at 10:15 a.m., several hours before it wrote its questions for the court, and the court did not order that Jasper remain in the vicinity of the courthouse during deliberations. The court simply asked for telephone numbers for counsel when the jury began deliberating. 3/12/09RP 33. The jury returned its verdict within one-half hour after receiving the court's responses to its questions. Supp. CP _, sub. no. 87A, p. 9.

The court did not conduct any on-the-record discussion of the jury note or its response. The court's responses to the jury's questions are written on a pre-printed form that contains the boilerplate phrase "Court's Response: (after affording all counsel/parties opportunity to be heard)." CP 50, 52. But the form does not explain or actually indicate Jasper or his attorney were consulted. The attorneys did not sign the court's response, appear in court, or mention having any knowledge of the exchanges

between the deliberating jury and judge. Thus, it does not appear that counsel was present or participated in crafting the court's response to the jury's question because of the very short time frame and the absence of any indication counsel was consulted in the otherwise detailed clerk's minutes.

c. The court's *ex parte* responses to the deliberating jury's questions were inadequate and coercive. The jury asked the court whether the essential elements of hit and run as set forth in the to-convict instruction are dependent upon a person's "mental, emotional, or physical condition." CP 49. The court summarily responded, "no further instructions will be given to this question," and directed the jury to "reread your instructions and **continue deliberating**." Id. (emphasis added). The court delivered the same response to the jury's other question, asking the court to explain "the spirit of the law," similarly instructing the jury to "continue deliberating." CP 51-52.

The court's refusal to provide the jury with pertinent instruction on the essential elements of hit and run was both incorrect and substantially prejudicial. The statute defining hit and run expressly exempts a person's criminal liability if he or she is physically incapacitated. RCW 46.52.020(4)(d). Yet the court's

original instructions had not explained that by law, a driver is not required to "fulfill his obligations" following an accident if he is physically incapacitated and the supplemental instructions asking about this very circumstance did not properly direct the jury to the governing law.

Jasper testified that he was substantially incapacitated by the accident. Although there was no evidence of serious physical injury, he was not taken to the hospital for an examination. 3/11/09RP 31. He was dazed and confused. He blacked out during the accident itself and needed to walk around to clear his head. He passed out in the police car. 3/11/09RP 31. He had trouble seeing and could not concentrate. Id. at 40-41. He did not hide or run away. Thus, the jury's question was targeted at the precise circumstances of the case and whether it should consider whether Jasper was unable to comprehend the nature of the accident or potentially physiologically unable to report the necessary information to the other driver.

Rather than informing the jury that by law, it could find Jasper physically incapable of fulfilling his obligations as the driver in a car accident, and letting the jury decide if Jasper's physical distress amounted to the necessary physical incapacity, or

discussing the issue with counsel and tailoring an instruction to the facts of the case, the court refused to accurately explain the law to the jury.

Jurors are free to weigh and determine facts based on their own common sense or personal beliefs. See Duncan v. Louisiana, 391 U.S. 145, 156, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968) (recognizing "common-sense judgment of a jury" as inherent component of jury trial right). There is no mechanical rule the jury must apply when deciding whether a case merits a not guilty finding.

Additionally, a trial court "has the responsibility to eliminate confusion when a jury asks for clarification of a particular issue." United States v. Southwell, 432 F.3d 1050, 1053 (9th Cir. 2005); see also Bollenbach v. United States, 326 U.S. 607, 612-13, 66 S.Ct. 402, 90 L.Ed.2d 350 (1946) ("When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy.").

In Southwell, the court's original instructions were not legally inaccurate, but were unclear. When the jury asked for clarification, the court refused and told them to use the instructions they had

been given. 432 F.3d at 1053. The court's failure to clarify its instructions in response to the jury's question was error. Id.

Here, the court not only failed to explain the law to the jury in an accurate fashion in response to its questions, but also inexplicably pressured the jury to "continue deliberations." There was no reason for the court to order the jury to continue deliberations, but the court twice expressed its concern that the jurors do so. While the impact of the court's coercive direction is impossible to know, courts must be cautious when directing the jury to continue deliberations, as it implies the court is dismissive of the jury's concerns or has a stake in the deliberations. The jury should deliberate without any pressure from the court. State v. Ford, 151 Wn.2d 530, 539, 213 P.3d 54 (2009); State v. Boogaard, 90 Wn.2d 733, 736, 585 P.2d 789 (1978); CrR 6.15(f)(2) ("After jury deliberations have begun, the court shall not instruct the jury in such a way as to suggest the need for agreement, the consequences of no agreement, or the length of time a jury will be required to deliberate."). The court's instruction directed that further deliberations were required when the court had no basis to intervene in this fashion and it violated CrR 6.15 by suggesting that further deliberations were necessary.

d. The court was required to protect Jasper's right to counsel and to personally participate in the case. The record does not demonstrate the court protected or respected Jasper's right to be present and consult with counsel regarding the jury inquiry.

On occasion, courts have found a defendant need not be present during technical legal discussions or simply procedural matters such as scheduling. Lord, 123 Wn.2d at 306. But this jury inquiry was not administrative or purely legal. The jury had read the instructions and needed further information. Moreover, the jury's question went to the heart of an available statutory defense on which the court had not provided instruction. Had Jasper been present during the discussion of how to respond to the jury's questions, he could have urged the court to let the jury take his mental or physical state into account and decide whether it incapacitated him, which would be a factual question for the jury. Instead, the court quickly and summarily offered no explanation of the available law that allows the jury to consider the condition of the driver. The court did not include Jasper in its process of responding to the jury's notes and it should have.

e. The trial court's failure to include Jasper in its response to the jury inquiries, and its incorrect and coercive instructions, require reversal under the State and Federal Constitutions. The federal constitutional right to be present is culled from the rights to due process of law and to confront one's accusers, and if there is a violation of the right to be present, "the burden is on the prosecution to prove that the error was harmless beyond a reasonable doubt." United States v. Marks, 530 F.3d 759, 812 (9th Cir. 2008); State v. Rice, 110 Wn.2d 577, 613-14, 757 P.2d 889 (1988), cert. denied, 491 U.S. 910 (1989). But the Washington Constitution expressly declares a right to be present and thus more strictly requires the State to enforce this fundamental right. State v. Ahren, 64 Wn.App. 731, 735 n.4, 826 P.2d 1086 (1992).

Article I, section 22 explicitly guarantees,

> In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf,[and] to meet the witnesses against him face to face [and] . . . to have a speedy public trial . . . .

(emphasis added). Furthermore, when the Framers drafted the state constitution it was the prevailing understanding that an

accused person had a personal right to be present during discussions of jury instructions. Linbeck v. State, 1 Wash. 336, 338-39, 25 P. 452 (1890) (repeating and orally explaining jury instructions to deliberating jury with counsel but without defendant's presence is error "and we do not think this error was cured by the fact that defendant's attorney was present and made no objection."); State v. Beaudin, 76 Wash. 306, 308, 136 P. 137 (1913) (reversal where court repeated instructions to deliberating jury, because "The giving of an instruction in appellant's absence constituted prejudicial error, which was not cured" by later reinstructing the jury with defendant present, because the right to be personally present is mandatory for all substantive trial proceedings and is strictly enforced). A Gunwall analysis further demonstrates the substantive difference in the state and federal constitutional protections, mandating stringent protection of this right in Washington.[4]

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[4] The six factors used in assessing the differences in state and federal constitutional protections are: (1) the textual language of the state constitution; (2) significant differences in the texts of parallel provisions of the federal and state constitutions; (3) state constitutional and common law history; (4) preexisting state law; (5) differences in structure between the federal and state constitutions; and (6) matters of particular state interest or local concern. State v. Gunwall, 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986).

i. Textual Language and Texts of Parallel Provisions of State and Federal Constitutions (factors one and two). Because the right to appear in person is not expressly mandated in the federal constitution, while the state constitution forthrightly declares the "accused shall have the right to appear and defend in person," the difference in textual language demonstrates the State Framers' intent to provide greater protection for the right to be present at trial than the federal constitution. The framers of the Washington Constitution were certainly aware of the federal constitution, and they specifically drafted and adopted different language. State v. Foster, 135 Wn.2d 441, 957 P.2d 712 (1998) (citing Robert F. Utter, Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights, 7 U. Puget Sound L. Rev. 491, 515 (1984) and Lebbeus J. Knapp, The Origin of the Constitution of the State of Washington, 4 Wash. Hist. Q., No. 4, at 246 (1913)). In addition, Article I, section 22 lists several rights personally accorded an accused person and not included in the Sixth Amendment, such as the right to meet witnesses face to face, have a copy of the charge, testify on one's own behalf, and to appeal. Id. at 485-86.

ii. State constitutional and common law (factor three). The Constitutional Convention of 1889 provides no additional evidence of the framers' intent. Rosenow, Journal of the Washington State Constitutional Convention 1889, p. 511 (1962). In particular, little is known about the history of the drafting of Article I, section 22. Foster, 135 Wn.2d at 722, 734-35; State v. Silva, 107 Wn.App. 605, 619, 27 P.3d 663 (2001). Logically, the framers of the Washington Constitution did not intend Article I, section 22 to be interpreted identically to the federal Bill of Rights, since they used different language and the federal Bill of Rights did not then apply to the states. Utter, supra, at 496-97; Silva, 107 Wn.App. at 619 ("The decision to use other states' constitutional language also indicates that the framers did not consider the language of the U.S. Constitution to adequately state the extent of the rights meant to be protected by the Washington Constitution.").

iii. Preexisting state law. Preexisting law mandated a defendant's presence as a necessary requirement before commencing trial. An 1854 territorial law provided, "No person prosecuted for an offense punishable by death or by confinement or in the county jail, shall be tried unless personally present during the trial." Laws 1854, p. 412, § 109. Another

territorial law provided, "On the trial of any indictment the party shall have the right . . . to meet witnesses produced against him face to face." Laws 1854, p. 371, § 2. These preexisting laws demonstrate a desire at the time of the framing of the constitution to expressly protect a defendant's personal right to be present throughout all material aspects of the trial upon its commencement, and these laws were strictly enforced. The court in Beaudin cited this law in reversing a conviction where the court answered a jury by re-instructing the deliberating jury without the defendant's presence. 76 Wash. at 308; see also Linbeck, 1 Wash. at 339 (repeating instructions to jury without defendant's presence not cured by counsel's presence); State v. Shutzler, 82 Wash. 365, 367, 144 P. 284 (1914) (state constitution guarantees accused person "right to be present at every stage of the trial when his substantial rights may be affected"). In Shutzler, the court emphasized that any violation of the right to be present cannot be tolerated, because "[t]he wrong lies in the act itself, in the violation of the constitutional and statutory right of the accused to be present and defend in person and by counsel." 82 Wash. at 367-68.

iv. Differences in structure between state and federal constitutional provisions. The United States Constitution is

a grant of limited power to the federal government, whereas the Washington constitution imposes limitations on the otherwise plenary power of the state. Foster, 135 Wn.2d at 458-59; Gunwall, 106 Wn.2d at 61. This factor supports an independent analysis of the right to presence, just as it does the right to self-representation and the right to face to face confrontation. Foster, 135 Wn.2d at 458-59; Silva, 107 Wn.App. at 619. Because Article I, section 22 expressly grants the right to appear and defend in person, and the federal constitution does not, the state constitution embodies an intent to mandate such presence during any substantive legal proceedings unless expressly waived.

v. Matters of particular state or local concern.

The regulation of criminal trials in Washington is a matter of particular state concern. State v. Boland, 115 Wn.2d 571, 576, 800 P.2d 1112 (1990); Gunwall, 106 Wn.2d at 62. This includes the protection provided to criminal defendants by the confrontation clause, and similarly, throughout proceedings that may affect the substantial rights of the accused. Foster, 135 Wn.2d at 494; Shutzler, 82 Wash. at 367. Jury instruction is plainly a matter of particular local concern as it is predicated on the jury understanding state law in a state court prosecution. See State v. Lanciloti, 165

Wn.2d 661, 666-67, 201 P.3d 323 (2009) (discussing constitutional requirement that juries shall be drawn from county where offense occurred).

vi. The greater protection afforded by the Washington Constitution means courts may not deny a defendant the opportunity to participate in a substantive stage of proceedings without an express waiver. As articulated in Shutzler, a violation of the right to be present is "conclusively presumed to be prejudicial." 82 Wash. at 367. It is a right that cannot be waived without being afforded the opportunity to do so. Duckett, 144 Wn.App. at 806-07.

> Since it is the right of the accused to be present at every stage of the trial when his substantial rights may be affected, it is no answer to say that in the particular proceeding nothing was done which might not lawfully have been done had he been personally present. The excuse, if good for the particular proceeding, would be good for the entire proceedings; the result being a trial and conviction without his presence at all. The wrong lies in the act itself, in the violation of the constitutional and statutory right of the accused to be present and defend in person and by counsel.

Shutzler, 82 Wash. at 367-68; see also Beaudin, 76 Wash. at 308; Linbeck, 1 Wash. at 339.

In State v. Easterling, 157 Wn.2d 167, 181, 137 P.3d 825 (2006), the Supreme Court ruled that even if the federal

constitutional right to a public trial may be reviewed for the harmlessness of the closure, the Washington constitution's explicit protection of the public trial right precludes any de minimus analysis. A similar approach should apply to the violation of Jasper's right to be present during a material portion of the trial, because the Washington Constitution expressly guarantees the right to be present at trial. His right to be present at trial is not meaningful unless he may participate in the process of properly explaining to the jury the type of evidence they may consider or the specific application of the law to the facts of the case. The error is structural, as dictated by the mandatory language of the state constitution, and is presumed prejudicial just as it is when the court violates the right to a public trial. See State v. Strode, _Wn.2d __, 217 P.3d 310, 316 (2009) (in Washington,"[t]he denial of the constitutional right to a public trial is one of the limited classes of fundamental rights not subject to harmless error analysis.").

Even under a constitutional harmless error test, the prosecution cannot prove this error harmless. During this material stage in the trial, the court summarily rejected the jury's request for an explanation of whether the driver's failure to remain at the scene of an accident can be excused by virtue of mental or physical

handicaps. The law provides that physical incapacitation is an excuse but the court never explained this legal principle to the jury. Jasper's defense was that he was suffering the mental, physical, and physiological effects of the accident and was simply trying to clear his head from the shock, not leaving the scene of an accident.

The court's failure to accurately instruct the jury, and its method of doing so without counsel or Jasper's involvement and participation as well as by coercively intervening in deliberations and directing the jury to continue deliberations, undermined Jasper's right to appear in person, participate in the trial, and receive a fair trial by jury, contrary to Article I, sections 21 and 22, as well as the Sixth and Fourteenth Amendments. Jasper's convictions must be reversed and his case remanded for a new trial.

F. CONCLUSION.

For the foregoing reasons, Mr. Jasper respectfully requests this Court reverse his convictions and remand the case for further proceedings.

DATED this 16th day of November 2009.

Respectfully submitted,

NANCY P. COLLINS (WSBA 28806)
Washington Appellate Project (91052)
Attorneys for Appellant

APPENDIX A

16

STATE OF WASHINGTON
DEPARTMENT OF LICENSING
P. O. Box 9030 · Olympia, Washington 98507-9030

April 14, 2008

gt

The information in this report pertains to the driving record of:

Lic. #: JASPEDS403QJ
Name:JASPER, DOUGLAS SCOTT
10724 SUMMIT LK RD NW
OLYMPIA WA 98502

Birthdate: November 11, 1960
Eyes: BLU Sex: M
Hgt: 5 ft 11 in Wgt: 175 lbs
License Issued: September 15, 2005
License Expires: November 11, 2009

After a diligent search, our official record indicates that the status on February 14, 2005, was:

Personal Driver License Status:
- Suspended in the third degree

Commercial Driver License Status:

The following also applied:

PDL Attachments:
- Notice of Suspension June 28, 2007

CDL Attachments:

STATE OF WASHINGTON · OFFICIAL · SEAL · DEPARTMENT OF LICENSING

Having been appointed by the Director of the Department of Licensing as legal custodian of driving records of the State of Washington I certify under penalty of perjury that such records are official, and are maintained within the Department of Licensing.

Judy K. Hargrove

Custodian of Records
Place: Olympia, Washington
Date: April 14, 2008

The Department of Licensing has a policy of providing equal access to its services. If you need special accommodation, please call (360) 902-3900 or TTY (360) 664-0116.

JASPEDS403QJ 20070426 071315247

ABFT

STATE OF WASHINGTON Department of Licensing

PO Box 9030, Olympia, WA 98507-9030

I00082078

May 14, 2007

File Copy

JASPER, DOUGLAS SCOTT
10724 SUMMIT LK RD NW
OLYMPIA WA 98502

DP

License #: JASPEDS403QJ
Birthdate: 11-11-1960

On 06-28-2007 at 12:01 a.m. your driving privilege will be suspended. The Court has notified us that you failed to respond, appear, pay, or comply with the terms of the citation listed below:

Citation Number	Violation Date	Reason for Citation
I00082078	04-26-2007	DRIVING W/O LIABILITY INS

What do I have to do to avoid suspension of my driving privilege?

1. **Contact this court to find out how to take care of this citation:**
   PUYALLUP MUN CRT
   929 E MAIN AVE STE 120
   PUYALLUP, WA 98372
   (253) 841-5450
2. **Provide proof that you have satisfied the court's requirements.** Once the requirements are met, the court will send us notice. Because this may take several days, you may take your copy of the Notice of Adjudication form from the court to any driver licensing office to speed up the process.

What will happen if my driving privilege is suspended?

Make sure that we have received notice that this matter is settled before the date shown above. If we have not, it will be illegal for you to drive and you must surrender your license to any driver licensing office. You must pay a reissue fee and any other applicable licensing fees before a new license can be issued.

May I appeal this action?

Yes. To request an administrative review return the enclosed form or submit a written request to: Department of Licensing, Hearings & Interviews, PO Box 9031, Olympia, WA 98507-9031 or fax to (360)664-8492. Requests must be postmarked within 15 days from the date of this notice. If you have questions, please call (360)902-3878.

If you have other questions after contacting the court, call Customer Service at (360) 902-3900 or visit our website, at www.dol.wa.gov.

The Department of Licensing has a policy of providing equal access to its services. If you need special accommodation, please call (360) 902-3900 or TTY (360)664-0116.

I certify under penalty of perjury under the laws of the state of Washington that I caused to be placed in a U.S. Postal Service mail box, a true and accurate copy of this document to the person named herein at the address shown, which is the last address of record, postage prepaid, on May 14, 2007.

Agent for the Department of Licensing

Authority: RCW 46.20.289

JASPEDS403QJ 20070115 071295318

ABFT

STATE OF WASHINGTON Department of LICENSING

PO Box 9030, Olympia, WA 98507-9030

May 14, 2007

7Y0205607

File Copy

JASPER,DOUGLAS SCOTT
10724 SUMMIT LK RD NW
OLYMPIA WA 98502

DP

License #: JASPEDS403QJ
Birthdate: 11-11-1960

On 06-28-2007 at 12:01 a.m. your driving privilege will be suspended. The Court has notified us that you failed to respond, appear, pay, or comply with the terms of the citation listed below:

Citation Number	Violation Date	Reason for Citation
7Y0205607	01-15-2007	REGISTRATION VIOL/NO TABS

What do I have to do to avoid suspension of my driving privilege?

1. **Contact this court to find out how to take care of this citation:**
   PIERCE CO DIST CRT
   930 TACOMA AVE S RM 601
   TACOMA, WA 98402-2175
   (253) 798-7487
2. **Provide proof that you have satisfied the court's requirements.** Once the requirements are met, the court will send us notice. Because this may take several days, you may take your copy of the Notice of Adjudication form from the court to any driver licensing office to speed up the process.

What will happen if my driving privilege is suspended?
Make sure that we have received notice that this matter is settled before the date shown above. If we have not, it will be illegal for you to drive and you must surrender your license to any driver licensing office. You must pay a reissue fee and any other applicable licensing fees before a new license can be issued.

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I certify under penalty of perjury under the laws of the state of Washington that I caused to be placed in a U.S. Postal Service mail box, a true and accurate copy of this document to the person named herein at the address shown, which is the last address of record, postage prepaid, on May 14, 2007.

Agent for the Department of Licensing

Authority: RCW 46.20.289

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. DOUGLAS JASPER, Appellant.	)))))))))	NO. 63442-9-I

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STATE OF WASHINGTON
2009 NOV 16 PM 4:41

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 16TH DAY OF NOVEMBER, 2009, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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[X] DOUGLAS JASPER 10724 SUMMIT LAKE RD NW OLYMPIA, WA 98502	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 16TH DAY OF NOVEMBER, 2009.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710